No. 97-1173 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TOM BATES, ET AL.,

Petitioners,

v.

BILL JONES,
SECRETARY OF STATE OF CALIFORNIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Respondent Bill Jones, Secretary of State of California, respectfully requests that this Court deny the petition for a writ of certiorari, which seeks review of the Ninth Circuit's 9-2 en banc decision sustaining California's term limits. That en banc decision is reported at 131 F.3d 843 (1997).

REASONS FOR DENYING THE WRIT

Six years ago, this Court denied certiorari from a lower court decision sustaining the same term limits law against the same First and Fourteenth Amendment challenge brought by the same plaintiffs' counsel. *Legislature v. Eu*, 503 U.S. 919 (1992), *denying cert. from* 54 Cal.3d 492 (1991). The grounds for denying certiorari are even more compelling today.

1. *The Utter Lack of Any Lower Court Conflict*. There was no conflict among the lower courts then, and there is none today. In the intervening years, however, the trickle of cases sustaining term limits for state officials has become a torrent. With some errant decisions within the Ninth Circuit now corrected, that torrent all flows in one direction: every jurisdiction to rule on the question *uniformly* holds that term limits on state officials are constitutional. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970); *Maloney v. McCartney*, 149 W. Va. 513, 223 S.E.2d 607 (1976), *appeal dismissed for lack of a substantial federal question*, 425 U.S. 946 (1976); Legislature *v. Eu*, 54 Cal.3d at 514-25; *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup. Ct), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir. 1995); *Cawdrey v. Redondo Beach*, 15 Cal. App. 4th 1212, 1228-31 (1993); *U.S. Term Limits, Inc. v. Hill*, 972 S.W.2d 349, 359-60 (Ark. 1994), *aff'd on other grounds*, 514 U.S. 779 (1995); *Nevada Judges Ass'n v. Lau*, 910 P.2d 898 (Nev. 1996); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me.), *aff'd* 82 F.3d 546 (1st Cir. 1996); *Dutmer v. City of San Antonio*, 937 F. Supp. 587 (W.D. Tex. 1996); *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc); *Citzens for Legislative Choice v. Miller*, No. 97-CV-73777-DT (E.D.Mich. Feb 5, 1998). There is no reason for this Court to disturb such settled law. The Court

can always address the issue if and when any lower appellate court actually reaches a contrary conclusion.

2. *The Utter Lack of Any Conflict With This Court's Decisions*. The 9-2 en banc decision below is fully consistent with the only decisions of this Court ever to rule on whether term limits on state officials violate the First and Fourteenth Amendment. In *Moore v. McCartney*, 425 U.S. 946 (1976), this Court dismissed an appeal raising such a challenge on the ground that it did not even raise a substantial federal question. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court sustained the constitutionality of a limit (albeit one triggered not by terms in office but by years of life) that permanently prevented voting to retain judges who exceeded the limit. *Gregory* also reaffirmed the long-standing principle that, on Tenth Amendment grounds, qualifications (like term limits) that are imposed by a state on state officials get especially deferential constitutional treatment. *Id.* at 460-63.

Petitioner simply ignores these cases, trying in vain to instead manufacture a conflict between the en banc decision and *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). But *Thornton* made the entirely different holding that *any* additional qualification imposed by states on *federal* legislators -- including term limits -- violated the Qualifications Clauses. Its grounds were that by those clauses the "Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation." *Id.* at 779. *Thornton* thus did not involve the special Tenth Amendment problems that would be raised by restrictions on the state power to set qualifications for their own *state* officials. Nor did *Thornton* adjudicate any First or Fourteenth Amendment issues or purport to interpret those amendments. Indeed, it denied certiorari on those issues, allowing a lower court ruling sustaining term limits on *state* officials to stand.

True, the *Thornton* Court did hold that its interpretation of the Qualifications Clauses was informed by statements in the

legislative history of those clauses suggesting that many framers objected to any restriction on the people's ability to choose whomever they pleased to govern them in Congress. But even at the federal level, the Constitution offers mixed views on term limits -- they may be prohibited for Congress but are mandated for the President. And this case is not about term limits for Congress or the President -- it is about term limits for state officials. Thus, the legislative history of the congressional provisions enacted 81 years before the Fourteenth Amendment is just as irrelevant as the pro-term limits legislative history of the presidential provision enacted 83 years afterwards. The relevant constitutional provision is the Fourteenth Amendment (and its incorporation of the First), and nothing in *its* legislative history remotely suggests an intent to prohibit states from setting qualifications for state officials in a state constitution -- just as (in the above-noted provisions) the federal government sets qualifications for federal officials in the federal constitution. States are not required to be clones of the federal government.

Petitioners never come to grips with the fact that *Thornton* did not rest on the conclusion that there was anything especially troublesome about term limits. It rested rather on a conclusion, stretching back to *Powell v. McCormack*, 395 U.S. 486 (1969), and before that to 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (3d ed. 1858), that the Qualifications Clauses barred *any* additional qualification for Congress.[1] This interpretation has co-existed for decades with the principle that states *can* add qualifications that restrict choices for *state* officials. *See, e.g, Gregory*, 501 U.S. at 460-63; *Sununu v. Stark*, 420 U.S. 958 (1975);

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[1]Petitioners incorrectly state that the *Thornton* Court granted certiorari despite "striking unanimity" among the lower courts on terms limits. Pet. 10. In fact, the "striking unanimity" this Court described was on prohibiting "a State's addition of qualifications for a member of Congress," 514 U.S. at 798 -- *any* qualifications.

Chimento v. Stark, 414 U.S. 802 (1973); *Hadnott v. Amos*, 401 U.S. 968 (1971); *see generally* TRIBE, AMERICAN CONSTITUTIONAL LAW 1098 (1988) ("candidate eligibility requirements...are generally ...sustained so long as they rationally relate to a legitimate state interest."). Specifically, it has co-existed with term limits on state officials, which many states have had throughout this period, with their constitutionality either upheld or unquestioned. *See, e.g.*. *Moore*, 425 U.S. 946; *Maddox*, 226 Ga. 71, 172 S.E.2d 595; *Eu*, 54 Cal.3d at 514-25; PA. CONST., Art. 2, §3 (1790); MO. CONST. art. 4, §4 (1820); IND. CONST. Art. V, §1 (1851); ORE. CONST. Art. V, §1 (1857); KAN. CONST. Art. I, §1 (1859); MD. CONST. Art. II, §1 (1867); N.C. CONST. Art. III, §2 (1868); S.C. CONST., Art III, §2 (1868); TENN. CONST. Art. III, §4 (1870); GA. CONST. Art. V, §1, ¶2 (1877); MISS. CONST. Art. V, §116 (1890); DEL. CONST. art. III, §5 (1897); ALA. CONST. Art. V, §116 (1901); OKLA. CONST. Art. VI, §4 (1907); N.J. CONST. Art. V, §1, ¶5 (1947); ALASKA CONST. Art. III, § 5 (1956). Petitioners' sweeping misinterpretation of *Thornton* would invalidate all these historically accepted state term limits. It would further invalidate *any* qualification for state or local office -- residency, citizenship, minimum or maximum ages, bars on felons running -- as contrary to their new constitutional principle that voters for state office must be free to choose whomever they please.

There is simply nothing in *Thornton* to support such a bizarre conclusion. To the contrary, *Thornton* specifically *disclaimed* any such implication:

> The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. *Over half the States have adopted measures that impose such limits* on some offices either directly or indirectly, and the

> Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve. Term limits, *like any other qualification for office*, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. *It is not our province to resolve this longstanding debate.*

514 U.S. at 837 (emphasis added). *See also id.* at 845 (Kennedy, J. concurring) (stressing issue was state intrusion on federal domain). Even if despite this disclaimer *Thornton* meant to overturn scores of cases in dicta, and make all qualifications restricting voter choice for state officials impermissible, that dicta would have been in turn overturned by language in *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364, 1369-70 (1997).

It is thus not surprising that no court to consider term limits on state officials after *Thornton* has concluded that *Thornton* invalidates them, including even the district court below, which agreed *Thornton* "is largely inapposite." *Bates v. Jones*, 904 F. Supp. 1080, 1096 (N.D. Cal. 1995). *See also Nevada Judges Ass'n v. Lau*, 910 P.2d 898 (Nev. 1996); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me.), *aff'd* 82 F.3d 546 (1st Cir. 1996); *Dutmer v. City of San Antonio*, 937 F. Supp. 587 (W.D. Tex. 1996); *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc); *Citzens for Legislative Choice v. Miller*, No. 97-CV-73777-DT (E.D.Mich. Feb 5, 1998). The only surprise is that petitioners continue to insist otherwise despite all evidence and precedent to the contrary.

3. The Utter Lack of Any Conflict Even Among Ninth Circuit Judges on the Petition's Main Issues. Even among the thirteen Ninth Circuit judges that have (in the panel and en banc decision) ruled in this case, not *one* of them was willing to hold, as petitioners' argue, that term limits violate the Constitution. The three judges ruling for petitioner -- Judges

Reinhardt, Fletcher, and Pregerson -- ruled only that the procedure by which these term limits were enacted was flawed, and disclaimed any holding that term limits were substantively unconstitutional. That is, on petitioners' Questions Presented numbers 1-3, and the lion's share of their petition's arguments, there is not even a conflict *within* the Ninth Circuit. Petitioners seek to have this Court adjudicate issues on which they were unable to convince a single appellate court judge out of thirteen.

4. *Brevity Is Not a Basis for Certiorari*. Petitioners repeatedly argue that the en banc court opinion should be reviewed because its brevity indicates a lack of seriousness. Pet. 5, 7-8, 10. This is nonsense. Prolixity is not the hallmark of sound judgment. Given the uniformity of precedent, this is the sort of case that should have merited a one line dismissal of the complaint with a citation to authority.

It would be an extremely unfortunate precedent if this Court were to grant certiorari from opinions that were "too" short. The Federal Reporters are copious enough as it is. Moreover, here the en banc court's brevity no doubt in part reflected the enormous time pressure it was under to issue an opinion that could restore order to the California electoral process before the election deadlines, which would have begun to expire as early as December 26, 1997. The en banc court issued its opinion, and five separate concurring and dissenting opinions, within 28 days of hearing oral argument. App. 2. The California voters and electoral process owe these judges a debt of thanks for acting with such alacrity rather than spending precious electoral time fleshing out every jot and tittle of their reasons for rejecting petitioners' completely non-meritorious claims.

5. *The Correct Standard Was Clearly and Correctly Applied.* The en banc court clearly applied the correct legal standard: that "reasonable, nondiscriminatory restrictions" on voting rights are constitutional if justified by "important regulatory interests." 131 F.3d at 846 (quoting *Burdick v.*

Takushi, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). In fact, petitioners concede this is the correct standard. Pet. 11. Instead, petitioners claim that the en banc court misapplied this standard, arguing that it should have reached the opposite conclusion. Such claims of misapplication of the correct legal standard are explicitly condemned as a poor reason for certiorari in U.S SUPREME COURT RULE 10.

In any event, the en banc court was clearly correct in its application of the *Burdick-Anderson* standard, reaching the same conclusion as reached by *every* other jurisdiction to adjudicate term limits under the *Burdick-Anderson* test. *See supra* §1 (collecting cases). Namely, term limits are "neutral" and "do not constitute a discriminatory restriction" because they make:

> no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Nor does the Proposition "limit [ ] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."

131 F.3d at 847 (quoting *Anderson*, 460 U.S. at 793).

Petitioners assert to the contrary that term limits are discriminatory because they prevent voters from voting for particular candidates (like Tom Bates) and for experienced legislators in general. Pet. 12-13. But petitioners' position that they have a "right to vote for a particular candidate," Pet. 13, is flatly inconsistent with this Court's cases, which repeatedly have rejected that proposition. *See Timmons*, 117 S.Ct. at 1370; *Burdick*, 504 U.S. at 433; *Anderson*, 460 U.S. at 793 n.15; TRIBE, *supra*, at 1097 & nn.1-2. True, term limits - like any qualification -- may bar some voters from voting for a particular candidate who happens to share their view or political party. But voters remain free to vote for any other candidate with the same views or party, and would equally be barred from voting for a termed-out candidate with the

opposite views or party.[2]

Likewise, petitioners' position that term limits "discriminate" against the class of voters who prefer to vote for experienced legislators confuses mere distinctions with unlawful discrimination. *Every* candidate qualification could be said to be "discriminatory" if that were the case: for they all "discriminate" against the class of voters who prefer to vote for candidates lacking the mandated qualification. Indeed, term limits are not discriminatory even in this sweeping sense: many voters may support term limits even though they prefer experience in their legislators because they prefer even more to reduce the collective action problems that otherwise would

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[2]Petitioners also assert that term limits must be unconstitutional or else it would be constitutional to ban lawyers or college graduates from serving in office. Pet. 13. But this Court does not (and cannot) take cases so it can issue advisory opinions about hypotheticals like these that are unlikely to ever arise. In any event, the hypotheticals are clearly distinguishable. Bans on lawyers or college graduates would pose a much heavier and more discriminatory burden on voting rights because they would foreclose a far greater number of candidates who in aggregate are likely to lean toward distinctive political viewpoints, just as the minister candidates foreclosed by the law invalidated in *McDaniel v. Paty*, 435 U.S. 618 (1978). Term limits only foreclose one candidate in each district from one office -- thus leaving a wealth of other options open -- and apply equally to senior legislators of all political viewpoints. There is also no important regulatory reason for banning lawyers or college graduates, and certainly no reason to think such bans would actually lessen burdens on voting rights in the way that term limits do. Lawyers and college graduates do not have huge advantages over other candidates that compare to the seniority clout and public platform that senior legislators have -- one does not see lawyers and college graduates winning elections at a 100% rate like incumbent California Senators were before term limits. Even if lawyers and college graduates did have a significant advantage, if they deviated from the electorate's wishes they could be challenged by many other lawyers or college graduates with political views closer to the electorate's. In contrast, there is only *one* senior incumbent per district -- each of whom can deviate from his electorate's preferences without fear of being challenged by a senior incumbent with similar electoral advantages.

coerce and burden their voting choices. *See* Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHIC. L. REV. 83, 85-96, 114-48 (1997). Moreover, term limits affirmatively *reduce* discrimination because they help equalize the distribution of legislative power across districts by decreasing the maximum seniority difference between legislators.

This Court has wisely rejected defining "discriminatory" in a way that would encompass all qualifications and convert judges into general regulators of elections. The warrant for judicial oversight is not laws that burden voting for particular candidates but laws that burden voting for candidates with particular viewpoints. Only the latter raises the concern that the political process adopting the law in question was biased by a desire to entrench current lawmakers or parties in office. Without such a bias, the political process can better decide which election regulations are reasonable, and judicial strict scrutiny should not apply. *See* TRIBE, *supra*, at 1097; ELY, DEMOCRACY AND DISTRUST (1980). This understanding not only follows from this Court's statements, but is consistent with each and every voting rights case this Court has adjudicated.[3]

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[3]*Compare Anderson*, 460 U.S. at 792-93 (striking down early filing requirement because it disparately harmed independent voters, "an identifiable political group whose members share a particular viewpoint, associational preference, or economic status"); *Norman v. Reed*, 502 U.S. 279, 293 (1992) (striking down signature requirement that discriminated against new parties); *Ill. Elec. Bd. v. Socialist Workers Party*, 440 U.S. 173, 185-87 (1979) (striking down ballot access law that set higher threshold for new parties or independent candidates); *McDaniel*, 435 U.S. 618 (striking down law that discriminated against minister candidates); *Lubin v. Panish*, 415 U.S. 709 (1974) (striking down filing fee that discriminated against the poor); *Bullock v. Carter*, 405 U.S. 134 (1972) (same); *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down election laws that made ballot access nearly impossible for new political parties), *with Clements v. Fashing*, 457 U.S. 957, 967-98 (1982) (upholding law barring candidates who had not finished a term in state office because it "in no way burdens access to the political process by those who are outside the

Petitioners rely on passages in *Thornton* describing the state power to regulate elections as purely "procedural." Pet. 14. But petitioners ignore the fact that these passages address only the meaning of the Time, Place and Manner clause of the Constitution, which defines the state power to regulate *federal* elections. U.S.CONST., Art. I, §4, cl. 1. *Thornton* concluded that the Time, Place and Manner clause (as its words suggest) give states only a "procedural" power to regulate *federal* elections. 514 U.S. at 828-35. *Thornton* nowhere intimated that states cannot impose substantive qualifications in *state* elections. To the contrary, *Thornton* noted without a hint of disapproval that Arkansas had done just that, *id.* at 828, and distinguished *Clements* because there the indirect burden on federal candidates was justified by "'a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress,'" *id.* at 835 n.48.

Finally, petitioners claim that the en banc court erred by failing to apply least restrictive alternative analysis. Pet. 14-15. This claim is again flatly inconsistent with this Court's cases, which explicitly hold that such least restrictive alternative analysis does not apply to a law that, as here, imposes at most a "reasonable, nondiscriminatory" burden on voting rights. *Burdick*, 424 U.S. at 440 n.10; *Timmons*, 117 S. Ct. at 1373. Having reached this correct threshold conclusion, it sufficed that there were important state regulatory interests at stake, which the en banc court noted were clearly present: "Long-term entrenched legislators may obtain excessive power

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'mainstream' of political life"); *Burdick*, 504 U.S. at 438 (sustaining regulation as "politically neutral" because "there is nothing content based about a flat ban on all forms of write in ballots"); *Timmons*, 117 S.Ct. at 1370-72 (sustaining as nondiscriminatory a law that prevented any party from choosing a candidate who was already another party's candidate); *Munro v. Socialist Workers Party*, 479 U.S.189, 190-92 & n.1 (1986) (sustaining requirement that minor-party candidates receive 1% of all votes cast where major-party candidates had to receive 5% in prior election).

which, in turn, may discourage other qualified candidates from running for office or may provide the incumbent with an unfair advantage in winning reelection." 131 F.3d at 847. These interests are not only important -- they show that term limits actually *reduce*, not increase, burdens on voting rights. *See also* Elhauge, *supra*.[4]

6. *The So-Called "Due Process" Issue Is Factbound, Raises No Conflict, And Was Clearly Correctly Decided.* Petitioners also half-heartedly ask this Court to take certiorari over a purported due process problem created because

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[4]Petitioners claim that the state's regulatory interests are inconsistent with *Buckley v. Valeo*, 424 U.S. 1, 48-59 (1976), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See* Pet. 15. Neither claim is tenable. (1) Unlike the campaign finance regulations at issue in *Buckley*, term limits do not restrict political *speech*. They simply set qualifications for who can run for office. If making a particular result politically impermissible counted as a restriction of the political speech of those wanting to achieve that result, then practically every state constitutional provision would be invalid. For example, under this crazy logic a state constitutional right of privacy would unconstitutionally restrict speech because it would make it ineffective to speak and associate to enact legislation that infringed on that privacy right. Even if *Buckley* applied, the right analogy would be not to restrictions on campaign contributions, but to a (perfectly constitutional) condition that those who accept public funding limit themselves to a certain amount of campaign spending. Under term limits, candidates are bestowed the advantage of a public platform that effectively provides years of free public advertising on the condition (prospectively imposed) that they limit themselves to a certain number of years in office. (2) Term limits do not impose the sort of racial preferences or quotas at issue in *Adarand*, and that was never asserted as a state interest. Rather, the State quite carefully stated: "While the State *does not argue* that it has a compelling interest [in] creating a demographically balanced Legislature, the fact that voters, now freed from the restrictions of the old system, have chosen more demographically balanced representatives certainly suggests that the greater freedom provided by term limits is making a positive difference." Appellant's Opening Brief at 90 (emphasis added) (noting that since the enactment of term limits, the number of women, Hispanic-American, and Asian-American legislators had dramatically increased).

petitioners claim the term limits law enacted by voters was excessively ambiguous. Pet. 15-17. Petitioners do not even try to claim that the en banc decision below raises any lower court conflict on due process. Nor could they, for the en banc decision did not even purport to rule on the legal question whether due process would have been violated if the measure had been ambiguous. The en banc court simply ruled that it did not have to reach the underlying legal question because it found the measure sufficiently clear. "Assuming, without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits on state officeholders, we hold that California's notice with regard to Proposition 140 was sufficient." 131 F.3d at 846.

Petitioners in essence argue that the en banc court made an erroneous finding when it found this particular measure unambiguous. Such arguments are explicitly cited as a poor reason for certiorari in U.S SUPREME COURT RULE 10. This Court is not a court of errors, dedicated to reviewing every factbound error it sees in lower court decisions.

Even if this Court were in the error-correction business, the en banc court was clearly correct in its conclusion that the measure was not ambiguous as to whether it imposed consecutive or lifetime term limits. The law's text plainly stated: "No Senator may serve more than 2 terms. . . . No member of the Assembly may serve more than 3 terms." Pet. 2. Petitioner claims this text might mean consecutive term limits because, after leaving office, a person would no longer be a "Senator" (or Assembly member) covered by the law, and thus would be free to run. This reading of "Senator" is strained enough, especially since the tradition is to continue to refer to a former Senator as "Senator." But the more devastating flaw in this interpretation is that the provision does not say no Senator who has served 2 terms can *run* for office; it says no Senator may *serve* more than 2 terms. Thus, even under petitioners' strained narrow reading of "Senator," a

former Senator who had served two terms, sat out one, and then got reelected would clearly once again be a "Senator" -- and just as clearly would be *serving* more than 2 terms in violation of the term limits law.

In any event, any ambiguity in the law was clearly resolved by the ballot materials describing it. The Preamble described the law as designed to redress "[t]he ability of legislators to serve unlimited number of terms, ..." which had "create[d] a class of career politicians," and that the means of redress were "limitations placed upon the number of terms which may be served." App. 217. This negates consecutive term limits, which neither eliminate career politicians nor set any limit on the total number of terms served as long as they are not consecutive. The opponents' ballot materials described the law as follows:

> 140 IS A *LIFETIME BAN.... PROPOSITION 140'S LIFETIME BAN*. 140 does *not* limit *consecutive* terms of office. Instead 140 says: After serving six years in the Assembly, individuals will be constitutionally *banned for life* from ever serving in the Assembly. After serving eight years in the Senate, individuals will be constitutionally *banned for life* from ever serving in the Senate. Similar lifetime bans will be imposed on...other statewide offices....Once banned, always banned....No matter how good a job someone does in office, they will be *banned for life*....The backers of 140...impose a lifetime ban....No eligible citizen should be *permanently banned* for life from seeking any office in a free society. And we should not be *permanently banned* from voting freely for the candidate of our choice... VOTE NO ON PROPOSITION 140'S LIFETIME BAN.

App. 211-13 (emphasis in original). No voter could have missed the point.

The proponents' materials did not deny this but proudly agreed the law would "place a limit on the number of times a State official may serve in office[,]...reform...a legislature of

career politicians," and that "good legislators will always have the opportunity to move up the ladder." App. 208-09. Such statements negate consecutive term limits, which do not limit the total number of terms but rather require only a hiatus that neither eliminates career legislators nor forces moves up the ladder. The Proponents also proclaimed "Proposition 140 will *end* the reign on the Legislature's powerful officers," not that it would merely interrupt that reign, and that it "will put an end to the *life-time* legislators." App. 209 (emphasis added). Similarly, the neutral Legislative Analyst stressed that the law "limits the number of terms that an elected state official can serve in the *same office*." App. 206. Consecutive term limits do nothing of the sort. Extensive media coverage contrasted Proposition 140's lifetime term limits with a rival proposition's consecutive term limits. App. 7, 132-34.

Rather than point to any direct evidence of actual ambiguity, petitioners focus entirely on two red herring arguments. The first is that the California Supreme Court concluded that the law was "ambiguous." Pet. 16. This claim is false. The California court held that the text -- standing alone -- was "ambiguous," 54 Cal. 3d at 504, but then used the surrounding ballot materials "to resolve possible ambiguities" in the text and authoritatively construed them to "strongly support" the conclusion that "a lifetime ban from office was contemplated by the framers of, and voters for, Proposition 140." *Id.* at 504-05.[5] Thus, the en banc court correctly ruled:

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[5]Even with regard to the text, the California court did not mean the text was ambiguous in the sense of being difficult for voters to comprehend. Rather it meant it was ambiguous for purposes of the doctrine favoring narrow constructions where necessary to avoid declaring a law unconstitutional. To advance the quite different goal of maximizing the extent to which enacted laws are effectuated, this doctrine often allows strained constructions of laws. *Arizonans For Official English v. Arizona*, 117 S. Ct. 1055, 1074 (1997) (the question is whether "'a construction ... is fairly *possible*' that will contain the statute within constitutional bounds." (emphasis added)).

"*consistent with the California Supreme Court*, we hold that the relevant ballot materials and the surrounding context provided sufficient notice making it clear that Proposition 140 required lifetime bans." 131 F.3d at 846 (emphasis added).

Second, petitioners argue that counsel for a prior Secretary of State argued that the term limits law should be narrowly construed to impose only consecutive term limits. Pet. 16. We can only speculate why a prior Secretary of State from the opposing political party, represented by different counsel, might have adopted this strategy. Perhaps arguing for a strained interpretation seemed the best strategy for making sure the law's constitutionality would be sustained; perhaps the former Secretary disfavored term limits. It hardly matters, for the views of the former Secretary of State are entirely irrelevant here. What matters is that the actual ballot materials are not remotely ambiguous, and that the California Supreme Court -- which unlike any Secretary of State has the final authority for construing state laws -- authoritatively construed the law to impose lifetime term limits. "For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973).

7. Petitioners' So-Called Due Process Claim Lacks Any Basis In Law. Even assuming, *arguendo*, that the law was ambiguous, there is no support for the proposition that such ambiguity justifies striking down a statute on due process grounds. To the contrary, those cases that have ruled on the question have concluded that voter access to a law's text -- however ambiguous that text might be -- *cures* any due process problem with the ballot materials. *Burton v. Georgia*, 953 F.2d 1266, 1269 (11th Cir.1992); *Kohler v. Tugwell*, 292 F.Supp. 978, 980-81 (E.D.La.1968) (Rubin, J., for three judge court), *aff'd*, 393 U.S. 531 (1969); *Burger v. Judge*, 364 F.Supp. 504, 511 n.16 (D.Mont) (three judge court), *aff'd*,

414 U.S. 1058 (1973). *See also Sabetti v. Dipaolo*, 16 F.3d 16, 18 (1st Cir. 1994) (Breyer, J.) ("we have searched the case law and have not found cases in which a garden-variety, textual ambiguity of the kind at issue here has risen to the level of a due process violation.").[6]

This uniform caselaw makes perfect sense. The ubiquity of legal ambiguity means that allowing federal courts to invalidate whichever laws they found unclear when enacted would open up an unprecedented Pandora's Box. Just about every state has enacted a due process clause to its constitution without clear knowledge of all its implications: does this mean the enactment of due process clauses itself violates due process? The worrisome sweep this new doctrine would have is underscored by just how flimsy the claimed ambiguity is in this case. This case also demonstrates how such a due process claim would inject judges into the political process -- giving judges the power to "clarify" proposed laws by handicapping

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[6]None of the cases cited by petitioners for their due process claim is to the contrary. Pet. 17 n.12. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), did not involve a procedural due process claim -- it involved the equal protection component of Fifth Amendment due process, *id.* at 99-100. And all the Court held there was that a compelling interest used to justify a law discriminating against aliens can be considered under equal protection scrutiny only if it was reasonable to presume the purported interest was the lawmaker's actual purpose. *Id.* at 103. Moreover, the Court was willing to make this presumption for standard political actors -- just not for agencies without any authority in the area. *Id.* at 103-05. Nothing in *Hampton* justifies striking down a law because it might have been unclear to the voters or other lawmakers who enacted it. *United States v. Bass*, 404 U.S. 336 (1971), and *Greene v. McElroy*, 360 U.S. 474 (1959), are not cases where this Court struck down statutes on grounds of excess ambiguity when enacted. They are cases where this Court exercised its authority to narrowly *construe* ambiguous *federal* statutes where they affected criminal rights, federal-state relations, or raised serious constitutional difficulties. Here, in contrast, we have a state law that has already been authoritatively construed by the highest state court, and petitioners seek its invalidation, not a narrowing construction.

the side they disfavor with the requirement of adopting their opponents' favored slogan -- which is precisely what the vacated Reinhardt opinion would have done here.[7] One can determine the result of just about every controversial political issue in the United States if one is given the enormous power of dictating how the issue is phrased. Nothing in the Constitution vests courts with that awesome political power. Even without the above problems, it would be profoundly anti-democratic for federal judges to make themselves arbiters of whether voters or other lawmakers should be *allowed* to vote for an ambiguous law. The essence of democracy is that voters and legislators get to decide *for themselves* whether they feel sufficiently informed to enact a law. Voting for an ambiguous law is like voting for a candidate with ambiguous positions. As long as the ballot correctly identifies which law or candidate is being voted for, it is up to the voters to make the political judgment whether that ambiguity is a reason to vote no. *Burton*, 953 F.2d at 1270.

Likewise, the law uniformly *rejects* the propositions -- necessary to petitioners' due process claim -- that: (1) due process requires "notice" before the enactment of general legislation, *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Nat'l Amusements v. Dedham*, 43 F.3d 731, 746 (1st Cir. 1995); *Interport Pilots v. Sammis*, 14 F.3d 133, 142 (2d Cir.1994); *37712, Inc., v. Ohio Dep't*, 113 F.3d 614, 619 (6th Cir. 1997); *Pro-Eco v. Bd. of Comm'rs*, 57 F.3d 505, 513 (7th Cir. 1995);

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[7]That opinion's main objection was that the text and ballot materials (other than the 11 references by the opponents) did not use phrases like "lifetime ban." App. 79, 107, 109, 124. Other than being the favored slogan of the opponents, it is unclear why the phrase "lifetime ban" should be used. For the phrase "lifetime ban" misleadingly focuses on what happens to senior legislators during *their* "lifetime," rather than focusing on freeing voters from the coercive pressures of the prior regime by limiting the total (not consecutive) number of terms any legislator could serve. The latter was the correct focus of the text, preamble, proponents, and legislative analyst.

Peterman v. Coleman, 764 F.2d 1416, 1419 (11th Cir.1985), and (2) federal courts can strike down an otherwise constitutional state law for being enacted with a bad process, *Turner Broadcasting v. FCC*, 512 U.S. 622, 652 (1994); *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904); *Fletcher v. Peck*, 10 U.S. 87, 130 (1810).

In short, petitioners' due process issue not only raises a purely factbound objection to a correctly decided finding that the law was unambiguous, but even if the law had been ambiguous when enacted, the uniform caselaw rejects petitioners' position that such ambiguity would constitute a due process problem.

8. *None Of The Issues Are Cleanly Presented To This Court.* Mindful of the need to conserve its limited time and docket, this Court quite properly refuses to take cases that do not cleanly present the issues sought to be adjudicated. This sound principle counsels against granting certiorari -- even if this Court were otherwise inclined to adjudicate the issues raised in the petition -- because none of those issues is raised cleanly.

This is a case involving multiple issues intertwined with complex procedural problems. The result was six separate opinions on the en banc panel. Two judges concluded that there was no jurisdiction under the *Rooker-Feldman* doctrine. 131 F.3d at 855-57. Three judges concluded that the merits were foreclosed by res judicata. *Id.* at 857-58, 860-61. The due process issue is fraught with other special procedural problems because it was never raised in the complaint or at trial but rather was simply added by the judges of the vacated panel decision. This not only means the due process claim should have been dismissed, *see Assoc. Gen. Con. v. Calif. Council*, 459 U.S. 519, 526 (1983), but that the claim lacks factual development on any of the key questions, such as whether: any voters were actually confused, any confusion affected their votes, any confusion reduced or increased the

votes cast for the Proposition, and if any confusion altered enough votes to affect the outcome. Moreover, none of the petitioners has *standing* to raise any due process claim because they either voted against term limits or were not registered to vote -- thus none can claim that the purported ambiguity tricked them into voting for term limits.

Even if these procedural hurdles did not ultimately result in certiorari being dismissed as improvidently granted, they may well draw enough justices to prevent the Court from reaching a clear majority conclusion on any issue. In addition, the multiple and mixed nature of the issues may also produce a fractured Court. Some Justices might dismiss the due process claim because of the lack of any ambiguity, others because such a due process claim has no basis in law, others because it was not raised below, and yet others because there is no standing. Or, in the unlikely event the Court decided to reverse the en banc court, some justices might do so on due process grounds, while others did on voting rights. The result would be fractured Court opinions that fail to provide useful guidance to the lower courts.

9. Granting Certiorari Now Would Be Extremely Disruptive. The California electoral process has had to endure months of tumult and uncertainty while the district court and Ninth Circuit panel decisions stood in open conflict with the California Supreme Court's decision sustaining the identical term limits. Now, at long last, order and uniformity has been restored by the Ninth Circuit's en banc decision correcting those errant decisions. It would be extremely disruptive if this Court were to disturb this long-deserved serenity by granting certiorari.

Granting certiorari would also disrupt the Ninth Circuit's internal process of self-correction. For some time, the Ninth Circuit has been urged in many quarters to take more cases en banc to reduce its remarkable reversal rate in this Court. Seemingly it has heeded this advice, a trend for which this case is but one example. Any move by the Ninth Circuit to correct

its errors in-house, rather than putting the burden on this Court, should be encouraged. The exact opposite message would be sent if certiorari were granted to review en banc Ninth Circuit decisions that -- like the one here -- helpfully eliminated an undesirable conflict in lower court authority.

CONCLUSION

There are no grounds under U.S SUPREME COURT RULE 10 for granting certiorari. There is no conflict among the lower courts or between the en banc decision and any decision of this Court. Indeed, several of the grounds raised by petitioners are explicitly disfavored by Rule 10. Even a prominent petitioner has candidly acknowledged: ""I don't see a real opportunity that the Supreme Court will hear the case." Dan Morain, *Reversal by Court Upholds State's Term Limits Law Ruling*, L.A. TIMES A1, 1997 WL 14011919 (Dec. 20, 1997) (quoting petitioner and Assembly Speaker Cruz Bustamante). He was right, and so was Justice O'Connor in denying a stay in 24 hours given that the prospect of certiorari was so unlikely. The petition for certiorari borders on the frivolous, and should be denied.

Respectfully submitted,

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